UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ACUITAS CAPITAL, LLC,

Plaintiff,

v. 23 CV 2124 (PAE)

IDEANOMICS, INC.,

Defendant. Hearing
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New York, N.Y.
April 7, 2023
11:00 a.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

McDERMOTT WILL & EMERY LLP
Attorneys for Plaintiff
BY: ANDREW B. KRATENSTEIN
LISA GERSON
HILARY UDOW

BARRY M. BORDETSKY
Attorney for Defendant

THE COURT: I'm calling the case of Acuitas Capital LLC v. Ideanomics, Inc., 23 CV 2124.

Who do I have for the plaintiff?

MR. KRATENSTEIN: Good morning, your Honor. Andrew Kratenstein of McDermott Will & Emery for the plaintiff. With me are Lisa Gerson and Hilary Udow.

THE COURT: Good morning to all three of you.

MR. KRATENSTEIN: Mr. Wachs is also here in the back.

THE COURT: Very good.

MR. BORDETSKY: Good morning, your Honor. Barry Bordetsky, Law Offices of Barry Bordetsky for the defendant, Ideanomics.

THE COURT: Good morning to you.

First of all, thank you, everybody, for the thoughtful and helpful submissions, and I hope as well that everyone had a healthy and happy Passover holiday.

I am largely prepared to rule. I have a pretty good idea of how to assess the issues, thanks to what you have submitted, but I do have some factual questions that I'd like to begin by putting to you all.

To begin with, let me just ask the open-ended question. What, if any, update is there?

MR. KRATENSTEIN: No update in terms of, if you are getting at discussions between the parties. There were some discussions after the hearing here. I won't get into the

substance of those, but there was a discussion between Mr. Wachs and Mr. Bordetsky about what it might take to get this resolved, but there has been no further discussion as far as I know.

There are a few other potentially material developments I do want to alert the Court to.

One of the issues is that the stock price is now under ten cents a share. That's relevant because, as your Honor may recall, we pointed out in our opening papers that there was already a delisting risk because the stock was under one dollar a share. When the stock was under ten cents a share, which it is now under, that then triggers another NASDAQ rule, rule 58.10, which states that if the stock is under ten cents for ten consecutive trading days, then that creates a reason to delist, and we are a couple of days into that now, that they broke that barrier a couple of days ago.

I raise that because -- and I know you are prepared to rule, but I want to make sure that the Court is cognizant -- we didn't get a chance to respond to their antidilution argument, which I'd like to address because it is pertinent to this issue.

They argue, well, you are not damaged because you have antidilution -- Acuitas Capital has antidilution protection. They are mixing apples and oranges there. The antidilution protection was something that was bargained for separate and

apart from the 90-day lockup.

THE COURT: Sorry. I am really just asking for factual updates. Let me then be more directive.

Did you get the shares that you were promised via the order that I issued after the last hearing?

MR. KRATENSTEIN: Yes. And we issued a new notice after the hearing for additional shares and that was honored as well.

THE COURT: That has been fully complied with.

MR. KRATENSTEIN: Yes.

THE COURT: Next question is, do you know how much money was put in escrow from the YA transaction?

MR. KRATENSTEIN: I'm glad you asked.

No, I don't. I asked Ideanomics' counsel that question. The response I got was that the preliminary injunction order does not require Ideanomics to disclose what was put in escrow, so, therefore --

THE COURT: That's crazy because that dollar amount may bear on the balance of equities in terms of other injunctive relief. If it's one dollar, it's one thing. If it's a large amount of money, it's another.

Did you make that argument?

MR. KRATENSTEIN: Yes. We pointed out that we believe we are entitled to know this information, and we are told -- they say they are in compliance with the order but would tell

me no more.

THE COURT: The order did not literally require that, but just common sense would.

MR. KRATENSTEIN: Yes.

THE COURT: Are you aware of any other violations that you contend have occurred with respect to your rights or the Court's order?

MR. KRATENSTEIN: We pointed out one in our papers. They have since modified, as they pointed out in their papers, that debenture so that it is no longer convertible. They do say that they intend to issue more stock or engage in financing that would result, presumably, in the issuance of more stock immediately after May 2. I guess that is not technically a violation.

THE COURT: It's clearly not technically a violation. May 2 is a bright line.

MR. KRATENSTEIN: Correct.

THE COURT: Understanding that we don't know yet -- when I get to Mr. Bordetsky, I expect we will know, but we don't know yet the amount of money that's been put in escrow.

Tell me about what protects your client's rights. Your client's fundamental right was to be able to convert and to have, as written, the period that ended May 2 free of other dilutive activity unless the stock price was at a threshold that permitted it.

The injury to you has been caused by the dilution from the sale to YA. How many shares did YA get pursuant to that?

MR. KRATENSTEIN: Give me a moment, your Honor. About 35 million shares.

THE COURT: How many shares does your client have?

MR. KRATENSTEIN: Now it has 42 million.

THE COURT: How many shares are there outstanding?

MR. KRATENSTEIN: They have -- let me go through the math here. They have a total of 612 million shares left, as I understand it.

THE COURT: I don't know what that means, left.

MR. KRATENSTEIN: Let me give you the full math. This actually comes in the context of the 250 percent reserve requirement. They have to reserve 250 percent of the shares. That means for us now, given the triggering of the antidilution, they have to reserve a total of 615 million shares, as we calculate it.

THE COURT: When you say reserved, does that mean for a future issuance? I don't understand it.

MR. KRATENSTEIN: Yes. If Acuitas Capital sends a conversion and/or exercise notices, they have to have at least that much stock on hand to honor them because the amount of stock that they have to deliver to Acuitas Capital will vary, depending on the price of the stock at that time. The lower the price, the more stock.

THE COURT: Right.

I guess the question is, that's what you say that Ideanomics has to have in reserve in the bullpen, whatever. But my question is really, how much is outstanding? How much -- we know that Acuitas has 42 million shares. You know that at least at some point YA had 35 million. There are plenty of others, no doubt, out there, including insiders.

Do you have a notion as to how many shares are held other than those in reserve?

MR. KRATENSTEIN: Yes. Let me give you the full math. Let me stop from the top, and I'll work downward from the biggest number to the lowest.

According to their 10-K, they have 1.5 billion authorized shares. According to the 10-K, they had issued 787 million of those. That leaves 713 million available as of the end of 2022, the financial period covered by the 10-K filing.

Subsequently, they issued, by our count, as I mentioned, 35 million shares to YA under the SEPA, 24 million shares concerning that security interest provided pursuant to what I'll call the McMahon note. You will recall that note that we talked about. There was a $2 million loan by the chairman of the company's father.

THE COURT: Is that violative?

MR. KRATENSTEIN: No. We don't contend that that is violative. We are just adding up the shares.

THE COURT: We have got 35 million to YA, 24 million, I'll just call it, to McMahon.

MR. KRATENSTEIN: 42 million, as I mentioned, to Acuitas. That totals 101 million shares. When you do the math, when you subtract 101 million from 713 million, that leaves 612 million shares available. You asked me how did you get 612. That's how I got it.

THE COURT: I see. You have a concern that, actually, although it's awfully close, they have -- by your math, they are short by 3 million shares what they are required to reserve.

MR. KRATENSTEIN: Correct.

THE COURT: But adding from the bottom up, as of the end of last calendar year, 787 million shares had issued, and you have just identified another 101, which would bring us to about 888 million shares outstanding.

MR. KRATENSTEIN: Correct.

THE COURT: When one asks about the dilutive effect here of the one impermissible activity, the YA $35 million --

MR. KRATENSTEIN: 35 million shares.

THE COURT: Sorry. Forgive me. 35 million shares. One moment, we are looking at about 4 percent or something -- it's about a 4 percent improper dilution.

MR. KRATENSTEIN: That sounds about right. Although I think you would have to multiply -- I think the proper

denominator would be the shares outstanding at the time of the issuance in March to YA.

THE COURT: Be that as it may, unless one assumes that the later or permissible issuances wouldn't have happened, we are fundamentally at -- 35 million is the numerator and the denominator is 787, plus some or all of the 42 million Acuitas, 24 million McMahon. You wind up with about 4 percent.

MR. KRATENSTEIN: That sounds right, your Honor.

THE COURT: One way to think about the harm to your client is, you have suffered an injury from a 4 percent dilution.

MR. KRATENSTEIN: That is one way to think about it.

THE COURT: Continuing with that one way, which seems mathematical, I recognize that future events may bear very much on whether that 4 percent dilution is a big deal, a little deal or not. Let's just suppose that the company regained health and at the end of the day you were seeking damages from the fact of this unauthorized 4 percent dilution. Just go with the estimate. How would you think about calculating? At the end of the day, later on, how would the damages analysis work on that premise.

MR. KRATENSTEIN: I'm glad you asked. I don't know because I am not sure how we would calculate how the stock price reacted to all that and what else was going on in the market at the time. I think that's one of the reasons that we

have the lockup, because it's very difficult to isolate that 4 percent impact.

THE COURT: I understand that, and I appreciate that it is not as easy a math exercise to do and it also turns on contingencies that we don't know. But I am trying to fill in a contingency, which is to assume a return to health and just trying to think about, at the end of the day, what a model for thinking about the harm would be.

MR. KRATENSTEIN: You'd have to factor in a number of factors. They would include, obviously, what was the impact on the stock price, how would that then affect the conversion rights because, as I mentioned, how much Acuitas Capital can convert is dependent on the stock price. So all of these factors need to be taken into account.

THE COURT: Right.

MR. KRATENSTEIN: I don't candidly know how we would do that, so that's one of the reasons we are asking for an extension.

THE COURT: It's a reason why there is an irreparable harm premise. It doesn't speak to what the remedy should be. It speaks to the reason why some equity remedy is in play. It doesn't tell you what it is, but I do find the numbers illuminating.

I guess now let's play out the alternative hypothetical, which is that the company goes under, goes

bankrupt. How do you think about the harm from the dilution in that scenario?

MR. KRATENSTEIN: Well, then, it is difficult to separate the harm from the dilution from all of the other harm. We have nothing. If the company goes under, Acuitas Capital is unable to recover at all.

THE COURT: And there would be a substantial argument in that case of no harm, no foul. In other words, that the dilution was a breach, but if a finder of fact were to conclude that the death spiral had begun and was not going to be stopped, whether or not there was an unlawful dilution, on that scenario the harm to you was putting your money in the Titanic, not problematic dilution.

MR. KRATENSTEIN: I suppose the issue would then be, we are all obviously thinking about what's the but-for world. It would depend on when the company went under. If the company went under after, in my scenario, June 16, which is what we are asking for, Acuitas Capital would have been able, presumably, to get out of its positions.

One of the issues that I wanted to actually get to is that the flood of shares into the market, whether in part because of the trigger of the antidilution, also because of the additional financing that they say that they have on the line, actually makes it much more likely, particularly if there is no extension of the lockup, that at least Acuitas Capital, and

maybe others, will have to rush to sell this stock. That depresses the stock price. That all makes delisting more likely. It's not really good for anyone.

THE COURT: The rush of capital, though, one has to distinguish between the unlawful expansion of shares and the lawful. I appreciate that the stock price has plunged way more than 4 percent, even between our hearings, and, again, there is no expert economist here.

But intuitively it wouldn't seem to be logical to assume that what triggered that drop was predominantly the approximately 4 percent dilution. Intuitively, that would all else being equal, trigger a 4 percent drop. Obviously, there are a lot of other factors in play, but I'm having a little difficulty plucking out the dilution as a cause of more than that.

MR. KRATENSTEIN: There are multiple factors at play here. I think we need to look at the big picture. Let's recall that the two conversion notices that were sent and not initially complied with until your Honor issued your order were sent on March 3 and March 6. So had those been complied with at that time, Acuitas Capital would have had approximately two months to sell. Now, they get the stock in early April. They may have only one month, just on that stock. Now, there is a more of a rush if they don't have --

THE COURT: I see. That's the coherent theory of

damages, which is if you could establish to a finder of fact down the road that the business model of Acuitas here or its rational thinking, not with hindsight, but based on events in real time, would have led you to sell some or all of what you converted, had you converted earlier, then you've got an argument that the delay in time forced you, if you sell at all, to sell at a way lower price.

MR. KRATENSTEIN: Yes.

And, again, the sales, obviously, there is a domino effect. Because when you sell and you have to sell quickly, as opposed to selling over a period of time, that triggers a depression of stock price. And then you have additional -- granted it may only be 4 percent, but you have the YA now coming in. So you have all of this and then you have the additional delisting risk. And if there is a delist, now the stock goes to the over-the-counter market, which makes it harder to trade and further causes problems.

THE COURT: Has Acuitas sold or tried to sell any of the stock it has?

MR. KRATENSTEIN: I don't know the answer to that question. I can ask Mr. Wachs, if your Honor is willing to let me, but I don't know if it has.

THE COURT: Do you know whether there had been a concrete plan by Acuitas at the time it tried to convert, but proved unsuccessful, to promptly sell?

MR. KRATENSTEIN: Acuitas' plan is actually, to some extent, demonstrated by the lockup itself. So the lockup is for 90 days. Acuitas Capital's plan was to exercise its conversions and use that 90-day period, unless something unforeseen happened that made them change their plan, to exit the positions within 90 days.

THE COURT: Is that something that you have seen some documentary corroboration of? I know your clients have told you that, and I'm not discrediting it. But thinking ahead to what a damages trial might look like and a finder of fact saying, easy to say that now but is there something you can point to in real time, do you know if there is evidence that corroborates that that had been the intention?

MR. KRATENSTEIN: My understanding is that they have basically a formula that they use, which is, this is how we want to sell the stock and we want to do it over time. They have told me about the formula. I can't say I've seen it on paper. I am sure it does exist. That was the plan. They specifically bargained for that 90 days, and this goes back to the lockup, because that is their plan.

THE COURT: Understood.

Assuming that Acuitas had been able to convert when they tried to do so and allowing for whatever reasonable time it would take pursuant to what you say was an internal client plan to dispose of the shares, has there been any

seat-of-the-pants math done as to what the sales of those shares would have netted Acuitas?

MR. KRATENSTEIN: The short answer to your question is, I have not done that math, so I do not know the answer.

THE COURT: That sounds like, in a way, the most accurate shorthand in terms of thinking about a damages formula here. Your point is well taken that it's somewhat -- it's not just the 4 percent "dilution." It's the loss of the time opportunity if it could be established to a finder of fact that you in fact would have sold it in March or something.

MR. KRATENSTEIN: Right.

THE COURT: It appears to me that somewhere in that space is the most useful device for thinking about concretely how to monetize the harm to your client.

MR. KRATENSTEIN: Assuming, and of course your Honor started this with a very important and big assumption, that they are able to recover, which is still a tremendous risk that they won't be able to.

THE COURT: Let's turn to that then.

To be very direct with you, I'm skeptical extending the period of 90 days. It looks to me as if what you need, your client needs is cold hard cash. You need money preserved for your benefit. But it's unclear to me why extending the lockup by 48 days does you much good beyond giving you a lot of leverage with Ideanomics. Explain to me how that does you

good, as opposed to some alternative relief that hasn't been proposed which would involve escrowing money for your benefit.

MR. KRATENSTEIN: Acuitas Capital cares more about the value of the stock. Ideanomics cares less about the value of the stock. It's just trying to survive, as far as we can tell.

It is, thus, to their incentive, Ideanomics' incentive, to get financing however it can, whenever it can, and whatever happens to the stock price happens to the stock price. That all hurts Acuitas Capital.

What's going to happen, if the lockup is not extended, presumably, is as follows. Acuitas Capital will convert the remainder of its convertible securities. That will then wind up being tens of millions of more shares coming to Acuitas --

THE COURT: I thought you said they are limited to 6 -- they have to keep 615 in reserve, right?

MR. KRATENSTEIN: 615 have to be kept in reserve.

THE COURT: Until when, May 2?

MR. KRATENSTEIN: Right. Until we are done exercising.

THE COURT: So your worry is that on May 3, in order to get cash, they sell the other 612 or 615 million shares, something like that.

MR. KRATENSTEIN: That's one thing that could happen. There won't be enough. Right now there is already a shortfall, apparently, of the registered shares, even today, so that's a

problem.

Beyond that, if you just look at what's going to happen in the market, what will likely happen is, all of the stock will be sent at some point to Acuitas Capital. Acuitas Capital will then be under tremendous pressure to sell before May 2. When the date is kept at May 2, Ideanomics would be able to get new financing in return for issuing more stock, so there will be more dilution as of that date. So there is incentive for Acuitas Capital to sell between now and May 2. If that happens, the stock probably goes to a penny, arguably, because so much stock is going to get pumped into the market, and at some point there are not going to be enough people potentially to buy the stock.

THE COURT: That also has a pessimistic assumption. In other words, if Ideanomics is trying to get capital because it thinks it still has a decent business model and it just needs money to survive, the premise there is they have got a productive plan for that money.

MR. KRATENSTEIN: I suppose, but we have not seen it. We don't know what their plans are.

All we know is that Acuitas Capital, if May 2 stands, will likely have no choice but to just sell quickly, within now less than a month, and that is going to depress the stock price. That will, unless something unforeseen happens, result in delisting at some point, maybe even within ten days, and now

they are off running to the over-the-counter market to try the sell the stock.

THE COURT: How much money did Acuitas ultimately give in total to Ideanomics for its conversion rights?

MR. KRATENSTEIN: $20 million was the investment.

THE COURT: If you sold the stock that you have today at the current market price, how much would you get?

MR. KRATENSTEIN: I don't even know if they would recover that much. I think they would be taking a loss.

THE COURT: I know they have taken a loss. You've got 35 million shares.

MR. KRATENSTEIN: They have 42 million.

THE COURT: 42 million shares.

MR. KRATENSTEIN: It is at ten cents a share now.

THE COURT: At ten cents a share times 42 million shares is about 4.2 million.

Assuming that the market wasn't moved, assuming that all other factors stay equal, which is improbable, given the dynamic nature of events, and assuming that you had a trader who was able to bleed the sales out into the market in an orderly way that didn't trigger a panic, you would be able to get $4.2 million and so forth.

MR. KRATENSTEIN: With this much stock, I think the answer to that is no, because it's --

THE COURT: That's hard to disentangle from the fact

that other factors are driving the stock down.

MR. KRATENSTEIN: Yes. You're talking about tens of millions of shares, so this will be a major factor.

THE COURT: Let me turn to you, Mr. Bordetsky.

Just factually, how much money was put in escrow?

MR. BORDETSKY: $313,000, your Honor. And if I may --

THE COURT: Just explain how that all happened. What became of the rest of it? How much did YA pay?

MR. BORDETSKY: We have 313,000.

THE COURT: How much did YA pay to your client? They bought 35 million shares, right?

MR. BORDETSKY: The proceeds from that were 313,000, your Honor.

THE COURT: In other words, your client might have spent some of that before I froze it.

MR. BORDETSKY: Two separate transactions. Let me be clear. Two separate transactions.

There was a transaction that, for lack of a better phrase, may have triggered plaintiff coming into court, and then prior to the order there was a second transaction. The first transaction, the funds were spent. There are no funds remaining from that initial.

THE COURT: I'm sorry. Just to be clear, there is the transaction that I have found, the one in SEPA that was at some point in March.

MR. BORDETSKY: Yes.

THE COURT: How much did that --

MR. BORDETSKY: I don't have the number, your Honor. I apologize. I can get that in short time, your Honor, for the dollar amount, but the funds were utilized for the ongoing purposes of the company, such as filing the 10-K, ensuring that the business is moving. It was all utilized. It was all utilized.

THE COURT: Before you got into court.

MR. BORDETSKY: Well before.

When the second tranche came in, the order came, the order was sent in accordance with my obligation to this Court, directly to the client, to which the funds hadn't been received from YA at the time. When the funds were received from YA, we have -- the funds weren't received directly from YA because an escrow account had to be set up to ensure that we were in compliance.

THE COURT: The $313,000, though, itself, derives from the more recent issuance.

MR. BORDETSKY: Yes, your Honor.

THE COURT: Which you contend is no violation of your agreement with the plaintiff.

MR. BORDETSKY: That's correct.

THE COURT: That's 313,000.

MR. BORDETSKY: That's 313,000.

To counsel's point, counsel raised that he asked us for the dollar amount. That wasn't what was asked. What was asked was proof of compliance with the -- and I hope the Court wasn't offended because I wanted to pull up the correspondence, which was, provide proof that Ideanomics complied with the order. And our response was, Ideanomics has complied with the order. We don't have an obligation.

Just as, your Honor, with respect to when we provided the shares and the funds are going to be held *pendente lite*, we don't have anything identifying what was there. We have a presumption that we are both parties before this Court. We are both learned counsel, understanding the repercussions if we don't comply with this Court's order for the clients.

I just want --

THE COURT: I got that.

MR. BORDETSKY: I needed that clarity.

THE COURT: Clarity gotten.

Let me just ask you, can you ballpark, just from what you know, the approximate revenue from the first sale to YA?

MR. BORDETSKY: With the Court's permission, I can get -- I don't have my prior set of papers. I can find out that number within --

THE COURT: Mr. Kratenstein was rising.

No commentary, but do you have the number?

MR. KRATENSTEIN: Yes, your Honor. $3,482,500,

according to the 8-K they filed.

THE COURT: Mr. Bordetsky, any reason to doubt that?

MR. BORDETSKY: No. Particularly since, one, it is Mr. Kratenstein, and I don't think he would misrepresent, and, two, it's from the 8-K.

THE COURT: In effect, from the second installment, which is of a potentially different legal character, you were able to set aside the 313,000 in proceeds, which is something like 8 percent or so of the proceeds from the violative transaction.

MR. BORDETSKY: Different.

THE COURT: I understand it's a different pot of money, but my intention had been, I had hoped that some of the proceeds from the first YA transaction were still around. They weren't. It is what it is.

That is some rough proxy, crude to be sure, of what may turn out to be the damages theory for the plaintiff. In effect, from the second installment, the money you've been able to put aside equates to a little under 10 percent of that amount.

MR. BORDETSKY: Yes. Utilizing that basis, yes.

THE COURT: Let me just ask you -- I realize we are in early days yet. But take as a given the finding to this point of an apparent violation by Ideanomics with respect to that first transaction with YA, the one that yielded the $3.4

million.

How would you think the right analysis would be of what the injury is to Acuitas? The reason I am going there is, I am trying to fast forward ahead to think about Acuitas' interests and, to the extent an equitable remedy is in order here, what is proportionate to it.

Without arguing other points for now, just walk me through -- you are me. You have got to figure out what the rational mode is of thinking about the damage to Acuitas.

How do you process that.

MR. BORDETSKY: Of course, reserving our position with respect to the validity of the argument.

THE COURT: Got it.

MR. BORDETSKY: That being said, your Honor, you asked my colleague, what damages analysis would be associated with the allegation of dilution.

THE COURT: And as later developed -- I started with dilution. But then as the conversation went on, Mr. Kratenstein made a separate and seemingly colorable point, which is that it's not merely the dilution. It's the delay in getting in hand the shares.

MR. BORDETSKY: A couple of things. The law is clear that. You asked the Court, what could be the damages associated with the first two? And the answer is, 1.6 million. We have the specific number in our moving opposition papers,

your Honor, where what the Court is to do is to look to see the date of the breach, the value of the stock. We are done. That's it. It's 1.6 million, two different tranches. One was for approximately 1 million. One was for approximately 600,000.

THE COURT: It date of the breach were the dates on which a conversion was sought and not obtained, right?

MR. BORDETSKY: It was a date -- the law says the date of the breach is the date that the obligation to provide, so not the date of the notice of conversion, but the next day.

THE COURT: There are two aspects of problematic behavior by Ideanomics. One of them is providing the stock later in time, not until I had ordered that it be provided. About a month passes in between, or a little less than that, three weeks. That's one thing and that seems to be, in some ways, the clearest way of thinking about damages.

But there is a separate violation, which is the dilution.

MR. BORDETSKY: Sure.

THE COURT: Focusing on the first and putting aside the dilution, explain to me your theory on how you measure the damages from the delay in the conversion.

MR. BORDETSKY: I think we cited the authority in our opposition brief, your Honor.

The analysis is simple. It's the date that the

obligation was due, so each date that -- I believe it was the 3rd and the 6th, which would mean the 4th and the 7th, your Honor. I don't have a calendar, so forgive me.

The value of the stock at the time, I think it was at 13 cents, your Honor, whatever it was, and it's a multiplier. That's it. That's the simplicity of the damages and that's what we have put to the Court is, with respect to just those two aspects, they asked for shares. They didn't get the shares. What's their value? What is the dollar amount?

THE COURT: Help me with this. As I understand it, the conversion was not an affixed dollar amount. Is it the case that when Acuitas converts later on, they actually get more shares than they would have gotten on the 4th through the 7th, or did they get the same number of shares?

MR. BORDETSKY: I'm sorry. I'm not following --

THE COURT: Let me ask Mr. Kratenstein.

Mr. Kratenstein, just mathematically, did the conversion right entitle your client to a fixed number of shares, or was it to convert to get the number of shares that would be generated by dividing the money you contributed by the current stock price?

MR. KRATENSTEIN: There are two different instruments. The answer is different for the two of them.

For the preferred stock, there is a conversion price that is just over -- was just over 20 cents a share, and so

that gets you a certain amount of stock.

The warrants are different. The warrants are, basically, you can think of them as a price-list warrant in a sense that it doesn't have a price on the warrant. There is the conversion formula, this Black Scholes model, which the inputs include the stock price at the time that the stock -- the exercise known as ascend.

THE COURT: Got it.

Mr. Bordetsky, given that, sounds like there is a different analysis for the two tranches.

MR. BORDETSKY: There would be an analysis, but it's a mathematical analysis. That's the ease of the damages calculation, to the extent there was a finding as to, OK, had they converted, had these shares been provided -- because at the end of the day, they are asking for shares. The bottom line is, they are asking for shares. So if they are asking for common shares, it's the price point of the shares.

THE COURT: Right. If it simply had been, you get a million dollars worth of shares at the current price, you would have available the argument that whatever day you got the shares, you got a million dollars worth and the fact that they were trading at a lower price meant you got more shares.

Mr. Kratenstein basically rejoins by saying it's a little more complicated than that. You are not actually getting the same value on a later date because it isn't quite

that simple.

MR. BORDETSKY: I disagree with my friend. I disagree that the law is clear that the breach -- that the value of the shares on the date of the breach is the damages.

Now, there would be an offset if -- one point that the Court asked with respect to plaintiff of what has been sold we identified in our moving papers. In each instance that they received shares, approximately 24 million, there was, lo and behold, right around the same amount of number of shares that were sold in the market that depressed the price of the stock. That being said, your Honor, we take -- there would be if anything, an offset.

So, hypothetically, there are the two transactions. We have a dollar, $1.6 million that we calculated just based on of the value of the common shares at the time. If they sold it for 600,000, it's easy math. If they later received these shares, which they received in compliance with the Court's order and sold them at a price less than they would have received had the conversions been honored, we have got the difference. It's easy math.

THE COURT: Have you done a seat-of-the-pants estimate of what that number is likely to be?

MR. BORDETSKY: Our issue is, we can't tell the Court what they have definitively sold because there hasn't been an order to that effect that they have to provide. That would be

discovery associated with that. We would learn what they sold, when they sold it --

THE COURT: My understanding is, at this point, it does not appear that anything has been sold. Maybe that's true or not. Just operate on the assumption that they are sitting on this diminishing asset.

MR. BORDETSKY: Sure.

The quick answer is, if they never sold it, it went to zero, right, because that's their worst-case scenario, if you will. $1.6 million as it relates -- I'm utilizing the two transactions that weren't honored that were later honored. 1.6 million. The law is clear on that, your Honor.

As regards to whether they sold it, they sold. They have sold. We don't -- it would be super easy for this Court to have information from the plaintiff as to the amount. The securities world is the most regulated world. So they can provide, at a moment's notice, tongue and cheek, but they can provide when the shares were sold, for what price, and what amount they received them like that.

THE COURT: Let me turn to a different subject.

Right now, between now and May 2 or May 3, how is your client getting money to survive?

MR. BORDETSKY: Well, the quick answer is, it depends on what this Court is doing, because we have lined up and we indicated through --

THE COURT: Between now and May 2.

MR. BORDETSKY: Yes. We have indicated, through Mr. Poor's declaration, that we have lined up people to provide us with nonequity funding. But if an order comes down saying --

THE COURT: Put aside the order. Let's assume right now that you can do what you believe you can do.

MR. BORDETSKY: They're raising money.

THE COURT: You're raising money through nonequity issuing mechanisms.

MR. BORDETSKY: Yes. I'm being -- what I don't want to do is provide nonpublic information here. I'm walking carefully.

THE COURT: Let me see --

MR. BORDETSKY: We indicated in the papers they are -- I'm choosing my words carefully. They are actively, have been lining up active funding associated with raising funds for ongoing business. Again, there is 670 employees. It doesn't benefit anyone for this company to go under.

THE COURT: After May 2, assuming that there is no extension, what would the company's plan be?

MR. BORDETSKY: It would provide them with an alternative means of raising funds.

I don't have a definitive answer for the Court because we put a stop on everything to ensure that we weren't going to

be doing anything that this Court could see as a bad-faith move.

The quick answer is, there is a practical reality that in the past that they have provided shares, a convertible debenture, if you will, to think that that would happen in the future would be a logical followthrough with that argument, but I can't tell you definitively.

THE COURT: Put yourself in Mr. Kratenstein's client's shoes. You don't want the period of time, the May 2, to be extended. I understand that. I understand there are practical reasons from your perspective.

But assuming that the Court felt that some form of equitable relief, something, including setting aside more money, something was in order here. But, from your point of view, the extension from May 2 to mid June does more harm than good, balance of the equities.

Can you give me a productive proposal, something that assists the plaintiff, as opposed to a bunch of nos?

MR. BORDETSKY: The Court is asking me to provide a relief for the benefit of the plaintiff other than what was requested in the papers --

THE COURT: The Court is asking you to help the Court work through the balance of the -- wait a minute.

MR. BORDETSKY: I'm sorry. It's a bad habit, your Honor.

THE COURT: It's a terrible habit. And it's a terrible habit because it keeps happening between you and me, with my having warned you. Please don't. It's not personal. It is for the court reporter.

I'm asking you, because this squarely implicates the balance of the equities. You know that I found a violation. It's really twofold. It's the failure to convert on time and then it's the initial YA transaction. You know that I have found irreparable harm. Those weren't changing.

But the balance of the equities is the issue here, which includes not just thinking about the particular request at hand, but an alternative world. And it's a lot easier to see things your way if there is some other mechanism that can provide meaningful relief to the plaintiff.

You can say, I don't want to hell him, but you can also see that providing a constructive alternative route helps your client.

MR. BORDETSKY: Sure. I think that the request for the extension is, as we indicated in the papers --

THE COURT: I know, but you are not answering my question.

I asked you, give me an alternative to the request for an extension, and you come out of the box to attack the request for the extension. That's not answering the Court's question.

MR. BORDETSKY: The alternative -- the funds have been

held in escrow in terms of the -- in terms of the allowance with respect to an equitable remedy that would give the plaintiff what it believes is some relief to get a benefit of the lockup.

I don't know what -- the quick answer, your Honor, is, I can't think of one that would be that would be compliant with both the -- there is the original lockup, so they are asking for the extension. The funds have been put in escrow, so those aren't being touched at this time.

In terms of the issuance of the shares, whether it be additional shares, I can't speak --

THE COURT: Suppose the plaintiff had come here to propose some form of arrangement where, as more money comes in, some portion of it gets set aside for the plaintiff, added to the $313,000 pot.

Any problem with that?

MR. BORDETSKY: I think that the -- acknowledging the Court's equitable powers, I think that there is a need for the company to be able to utilize funds. To what extent in terms of a percentage --

THE COURT: I'm asking you conceptually, not haggling over price.

MR. BORDETSKY: In the ordinary course, this would certainly be something that I would speak to my client with respect to the process. I hope the Court can appreciate that.

THE COURT: Does your client or your client's executive staff have other things of value that could be secured so as to protect the plaintiff? I appreciate your client doesn't want to interfere with the mechanics of an ongoing business, but your client has also stuck the shiv into somebody who they had an agreement with, and that can't be ignored either. I am trying to think through the right equitable solution that doesn't, any more than necessary, get in the way of your client's bid for survival but also doesn't disrespect the victim.

MR. BORDETSKY: We indicated in our initial opposition the funds that we expect to come in from China.

THE COURT: How is that coming in? How is China --

MR. BORDETSKY: Approximately 7 million. So my understanding, with the machinations of having business in China, is that when you do business in China, the money -- it's all it can do, is cycle through until the business is over with. So we are closing that aspect of it and the funds, we believe, in May should be coming over, and we submitted a declaration to that point, your Honor, with respect to the dollar amount.

THE COURT: In other words, you've got some real cash coming in in May, not in April.

MR. BORDETSKY: Again, it's the People's Republic of China, so we believe that we have funds coming in. We are

working through the process. But it was important enough for us to inform the Court of this, that these are assets and there are other raises contemplated.

THE COURT: Let me turn back to you, Mr. Kratenstein.

The nature of this proceeding, which is that it came in all of a sudden, and we have been dealing with submissions from each side, but nothing that looks like adversarial discovery, means in part that you are left to guess about things financially.

Is there financial information from the defense that would be of use to you in an ongoing application for modified preliminary belief? Without boiling the ocean, what's the critical data that would be of use to you?

MR. KRATENSTEIN: If your Honor were so inclined to order such information, I think it would be the type of information, their financing plans, whatever letters of intent or other agreements, formal or informal, they have for future financing, any funds that are coming in when they are projected to come in, when they actually come in, that type of information.

THE COURT: Let me ask you this question.

If you got that sort of information, which might well be valuable for a dialogue in a subsequent proceeding between me and counsel, it also, for exactly the reason that Mr. Bordetsky spotted, sounds like inside information as

relevant to any trader.

It sounds to me as if, if your client got that information, your client might be precluded from buying or selling. That's a challenge because it is in fact exactly the sort of information that has the potential to be useful to me in a hearing like that. There might or might not be a way of doing this on a counsel's-eyes-only basis, but I am trying to work productively with counsel to help me solve the problem, but I also don't want to create a problem that, in the search of a solution, create a bigger problem.

Thoughts on that?

MR. KRATENSTEIN: I'm glad you brought it up because I completely agree with you. It would be very difficult for me, even on a counsel's-eyes-only basis, to assess that type of information. I really rely on my clients to tell me what that means for them.

That's one of the reasons why, your Honor -- and I know you came in perhaps disinclined to extend the injunction, but in some ways it's the simplest and least disruptive thing to do on the equities.

THE COURT: Going back to where I am going with you, is there a way, if I wasn't inclined to extend the period and if it was a bad idea to start prying loose inside financial information in an injunctive litigation, with all the problems for a lot of people that that could have, is there a formula, a

system, a structure that results in increasing the money set aside for your client while not scaring away the fishes, scaring away the lenders?

MR. KRATENSTEIN: My short answer to that question is, of course, if your Honor was not inclined to extend the injunction, it would be better to have more money put away, escrowed in the event that we have to litigate over damages. So, yes, it would be better, particularly since they have only escrowed, as you pointed out, 8 percent of the $3.482 million. It would better if more money was put away. That's for a number of reasons.

My concern is the same concern we came to court with, which is, this money is starving -- this company is starving for cash. We are concerned that, even if it's for our benefit, cash is put aside for our benefit, but we don't have really the currency that they intended -- that the parties agreed to give, which was stock and the lockup period in which to sell the stock, that is, in some ways -- and I'm sorry to repeat myself -- the least disruptive, we think, based on what we have read publicly, the 10-K, just their SEC filings, to them, and they could issue convertible -- if they want to issue debt, issue debt.

THE COURT: I don't know what the alternatives are available to them. But Mr. Bordetsky has proffered to us that, at a conceptual level, after May 2, the game plan involves

raising money by, in part, the issuance of stock, which stands to reason.

The issue with your extension is that it appears to create a substantial risk that that remedy, in some short-sighted way, might be beneficial to your client for leverage, but it may destroy the company. From a balance of equities perspective, that's hard to swallow.

MR. KRATENSTEIN: Understand --

THE COURT: Your best interests here are almost certainly aligned with Ideanomics' survival.

MR. KRATENSTEIN: Certainly. We want Ideanomics to survive. I appreciate and understand your point.

According to Mr. Poor's declaration, they have negotiated with various third-parties financing through convertible notes, so I take it that is convertible into stock, that would begin soon after. We don't know exactly when, May 2, 2023, and then he says they will lose the financing.

First of all, I do want to note that other than that statement, they have provided no evidence of that. They are just saying they will lose the financing. It's somewhat conclusory, to say the least.

They do have -- I only know -- we only know what we read in the public filings. They presumably could issue debt. They presumably could do other things that would not violate the lockup if it went on for another 48 days longer than May 2.

The best way to make Acuitas Capital whole or close to whole, given the financial situation of this company, is to let the company use its cash to operate. Remember, they also have that VIA acquisition they made that triples the amount of cash they need to use every month. Some money should be put aside to be sure.

But if it's between putting a lot of money aside and not extending the lockup, it's better to extend the lockup because then, at least, Acuitas Capital has the ability to use the currency that it has available to it that the company can make available to it, assuming the reserve requirement isn't breached. But assuming the company can make that stock available, that is the best way for them to get even close to what they bargained for. Otherwise, we are concerned there is actually increased risk that the company won't have the funds it needs to operate, and then that triggers the worst-case scenario for everybody.

THE COURT: One moment.

Counsel, if there is any factual information, not argument, I don't have that I should have, I'm happy to hear from you. But, otherwise, my intention is to take a brief recess.

MR. KRATENSTEIN: May I have a moment to just consult with my client?

THE COURT: Yes.

Mr. Kratenstein, factual. What is it?

MR. KRATENSTEIN: I did want to update the Court. You had asked if there had been any sales of the most recently received stock. There were sales in the amount of $420,000 worth. They have not settled yet, so we have not escrowed. When they do, we will escrow that amount.

The only other thing I note --

THE COURT: If I may, $420,000 worth sounds like something like 4 million shares.

MR. KRATENSTEIN: Yes.

The only other thing I would note is, and this goes back to the point I made about the 90 days and the importance of it, there is a pattern here. We talked a lot about the March 3 and 6 conversions. That was predated by the late February conversations, which they honored, the late February. So the way Acuitas Capital does this is, it basically spaces it out so that it's done every two weeks and sells volume, essentially, in 15 percent chunks.

THE COURT: In other words, later on in a damages proceeding there is a business practice that you would turn to to project the would-have-been world.

MR. KRATENSTEIN: There is a business practice.

I think the difficulty, your Honor, getting back to the irreparable harm, is figuring out what the monetary impact is of all of this, including with a company that doesn't have

cash, but we have covered that ground, so I won't repeat it.

THE COURT: Counsel, I'll be back in a half hour with a bench ruling. Thank you.

(Recess)

THE COURT: Counsel, I apologize for the delay. It took a little longer than expected. I have a bench ruling, and I'll ask my law clerk to give a copy to the court reporter.

I am now going to issue a brief bench ruling on plaintiff Acuitas Capital LLC's motion to modify the preliminary injunction granted on March 31, 2023.

As with the ruling last week, there will not be a written decision, and I will instead issue a bottom-line order reflecting the Court's resolution of the motion. To the extent the Court's reasoning is significant to counsel, you will need to order this transcript.

Acuitas moves for two modifications to the order granting injunctive relief.

First, Acuitas proposes a modification to paragraph 4 of the order. That paragraph, broadly speaking, prohibits Ideanomics from offering, selling, or otherwise transferring, indirectly or directly, any shares or securities convertible or exercisable for shares of capital stock of Ideanomics through May 2, 2023. Acuitas proposes that this "lock-up" period be extended through June 19, 2023. Acuitas also proposes that the order specify that it includes transactions under the standby

equity purchase agreement, or the SEPA, the amended secured debenture purchase agreement, the "amended SDPA," and the secured convertible debenture between Ideanomics and YA II PN or "YA."

Second, Acuitas proposes a modification to paragraph 6 of the order. That paragraph requires that, pending further briefing as to the legality of such sales, Ideanomics hold in escrow the proceeds of its sales to YA of Ideanomics' common stock on or after March 7, 2023. Acuitas proposes that the Court require Ideanomics to hold in escrow the proceeds of any sales or transactions involving Ideanomics capital stock entered into on or after February 1, 2023, including, but not limited to, funds received from YA pursuant to the SEPA, the amended SDPA, and convertible debenture.

I have reviewed in detail the parties' memoranda of law, supporting declarations, and the materials attached to those declarations. Again, I want to praise the quality and thoughtfulness of those submissions. I appreciate that counsel had a tight turnaround time and that some counsel were further constrained by the Passover holiday. I also want to thank counsel for helpful and informative colloquy today.

I incorporate by reference the account of the facts, the governing legal standards, and the reasoning for the preliminary injunction articulated in last week's bench ruling.

Paragraph 6.

I turn first to the proposed modification of paragraph 6, to require Ideanomics to hold in escrow all proceeds of transactions of its capital stock entered into on or after February 1, 2023, including funds received pursuant to the SEPA, the SDPA, and the convertible debenture. This modification is granted in part and denied in part.

The Court grants two aspects of the modification.

First, as to the start date for the transactions covered by paragraph 6, I find that requiring Ideanomics to hold in escrow funds received from transactions on or after February 1, 2023 is proper. That is so, given that the SPA, in section 4(j), states that the lockup period begins on the later of the execution date or the date of the last registration statement, which was declared effective February 1, 2023. As to the end date, however, the Court will make clear in the modified order that Ideanomics is to hold in escrow only proceeds received up to May 2, 2023. I will explain why shortly, in explaining my assessment of the proposed modification to paragraph 4.

Second, as to the scope of the escrow provision, I find it proper to modify the order to specify funds received from YA pursuant to the SEPA. That is because Acuitas has made a persuasive showing that transactions under the SEPA violated the lockup provision. I note that Ideanomics, in its briefing and at the hearing last week, has not meaningfully contested

that such transactions took place. Today, counsel for Ideanomics proffered that, regrettably, of the $3,482,500 that it received from the transaction with YA under the SEPA, there are no such funds remaining in its possession, custody, or control. The Court had hoped that such funds would be available that could be put aside to help protect Acuitas' interests. However, Ideanomics' counsel proffered today that all such funds had been expended as of the Court's order at the March 31 hearing. Nonetheless, for avoidance of doubt, in the event that, on further review, such proves factually incorrect and that funds traceable to transactions under the SEPA come to light, they are to be placed in escrow.

That leaves the transactions under the amended SDPA and from any convertible debentures with YA pursuant to it. I am persuaded that the nature of transactions under the amended SDPA is such that these do not have a dilutive quality. I rely here on Ideanomics' opposition and the Form 8-K filing that it attaches. The Form 8-K states that the amended SDPA was further amended on April 4, 2023 "to remove any reference to convertible features," meaning that the "debenture is no longer convertible into the company's common stock, or any of the company's issued and outstanding stock." Accordingly, debt financing from YA, pursuant to the amended SDPA, is not convertible to shares of Ideanomics' capital stock and is not prohibited by the lockup provision that the parties negotiated.

Also, accordingly then, the Court declines to modify the injunction to require Ideanomics to hold in escrow funds that it may receive in the future through the amended SDPA and from any further questionable debenture with YA. I therefore deny the proposal to modify the escrow provision to treat proceeds of future transactions under the amended SDPA and convertible debentures as violative.

That said, there is the $313,000 that Ideanomics, pursuant to the Court's March 31, 2023 order, put in escrow from the recent transaction with YA, pursuant to the amended SDPA and convertible debenture, pending briefing on whether that transaction was unlawful. It is now clear to the Court that that transaction was not dilutive and was not prohibited. Nonetheless, money is fungible and the Court is committed, where such is consistent with the balance of equities, to take action to help assure the availability of a remedy for Acuitas. Therefore, because Ideanomics had already spent the more than $3.4 million in fruits of its prohibited transaction with YA, the Court will require Ideanomics to continue to hold in escrow the sum, estimated at $313,000, that represents fruits of its lawful debenture transaction with YA. The balance of equities favors this measure, as there is tangible benefit to Acuitas, which faces a real risk of having no monetary remedy available to it, and there has been no showing of harm to Ideanomics sufficient to offset that benefit. I will therefore add a

sentence to paragraph 6 that reads: "In addition, the money held in escrow as of the date of this order, which derives from transactions pursuant to the amended SDPA debenture, shall remain in escrow, for the benefit of Acuitas."

I turn now to Acuitas' proposed modification of paragraph 4. Acuitas proposes to extend the lockup period to June 19, 2023. It also proposes to specify that transactions pursuant to the SEPA, amended SDPA, and convertible debenture are prohibited during the lockup period. The application to modify this provision presents a closer question, and the Court, again, grants in part and denies in part the modification.

As to the request to modify the lockup provision to specify transactions under the SEPA, the Court grants the modification, for the reasons just stated.

However, the Court denies the remainder of the proposed modification. The request to add references to the amended SDPA and convertible debenture is denied. That is because those transactions, as structured today, do not anticipate or empower the issuance of stock. They, thus, do not violate the lockup provision.

The Court also denies Acuitas' application to extend the lockup period to June 19, 2023. Acuitas reasons as follows. Ideanomics' breach of the SAP, it argues, denied Acuitas the "full benefit" of the lockup provision. That is

because Ideanomics breached, on or about March 14, 2023, that is, 48 days into the period, by entering into a dilutive arrangement with YA. To give Acuitas a fresh 90-day period in which there would be no dilution, save as authorized by the lockup provision, Acuitas proposes to extend the lockup provision to end on June 19 rather than to end on May 2. Acuitas cites cases in which courts have extended noncompete agreements upon the breach of such covenants. Acuitas further argues that extending this period will give it more time to sell the shares it has with less of a risk that the issuance of new shares will dilute the value of its shares. Ideanomics opposes on various grounds. One is that the SPA does not specify the temporal extension of the lockup period as the appropriate remedy for a contractual breach. Ideanomics also argues that the balance of the equities favors permitting Ideanomics to secure financing after the May 2, 2023 end-of-the-lockup period. It argues that it is already making capital-raising plans and that extending the lockup for 48 days would seriously inhibit its ability to stay afloat. To these arguments may also be added that insofar as the issuance of new shares after May 2 will bring in needed infusion of capital into Ideanomics, such would tend to fortify the company's prospects in a way that may offset or more than offset the dilutive effect of the issuance of new shares.

Although responsible arguments have been made in both

directions, the Court, relying on the balance-of-equities component of the test for preliminary injunctive relief, finds that Ideanomics has the better of the argument here. At the threshold, the provision in the SPA that states that any breach of its obligations constitutes irreparable harm means only that breach of the lockup provision lends itself to the possibility of equitable relief. It does not state what the injunctive remedy should be. It does not necessarily justify a day-for-day extension of the lockup period. That is really a factual question. And on the facts proffered, I find that such an extension would be a simplistic response, and potentially an ill-tailored response, to the harm alleged here.

Acuitas absolutely has a strong and legitimate interest in preserving the benefit of its bargain with Ideanomics. It bargained to be able to exercise its conversion rights and maintain its stake in the company, without the risk of dilution to its shares. That risk has been injured by Ideanomics having breached the lockup period through its transaction with YA under the SEPA. That dilutes Acuitas' stake in the company. Acuitas also appears to have been injured by the delay in the receipt of its converted shares. That cost it the opportunity to sell such shares earlier, at a higher price and over a more extended period of time. The Court has attempted to remedy that injury, albeit likely only in modest part, by requiring Ideanomics to hold in escrow any

proceeds from that sale and any others made in violation of the lockup provision, which runs until May 2, and, as I just discussed, requiring it to hold in escrow the additional proceeds of the debenture transaction under the amended SDPA, even though that transaction proved not to be violative. The funds in escrow may prove useful in providing some financial remediation. And because Ideanomics has been enjoined from violating that provision, were it to do so again, in other words, to engage in a prohibited dilutive transaction between now and May 2, not only would it be obligated to put the full proceeds of that transaction in escrow for Acuitas, it would also be in contempt of a court order, with all of the consequences that may follow.

And the Court is open to a future application for injunctive relief. Acuitas is invited to propose additional steps under which Ideanomics would set aside more money for the benefit of Acuitas upon a showing that such sums were necessary to achieve a proportionate remedy for the harm from Ideanomics' breach. In considering such an application, the Court would find it of value to receive a more concrete damages analysis from Acuitas than it has thus far received, so as to enable the Court to better understand Acuitas' estimation of the monetary harm it believes it has experienced that may prove incapable of remediation.

But extending the lockup period by 48 days is a step

of a different character. It would treat Acuitas' interest in installing an uninterrupted 90-day period of no dilution as dispositive. It would treat the existence of a standstill of that length as the key benefit for which Acuitas bargained. As such, because Ideanomics breached 48 days in, it would effectively create a 138-day lockup period tarred by one exception: The YA transaction under the SEPA. That is not sensible. It would not, by any means, achieve anything concrete for Acuitas, save to give it huge leverage and bargaining power over Ideanomics between May 2 and June 19, leverage it presently does not have, or at least to that degree. And it could stand to prevent Ideanomics from undertaking a panoply of dilutive transactions which, under its agreement, it was entitled to engage in after May 2., and it could, as Ideanomics suggests, paralyze the company from getting the liquidity after May 2 that it needs to stay alive.

On the limited record before me, I find that the potential existential harm to Ideanomics outweighs the nebulous justifiable benefit to Acuitas. Put a little differently, not all 90-day periods are the same, and restarting the 90-day clock on or about March 14 would put in place relief that is formally or superficially appealing but is desensitized to the economic reality of the situation. It is blind to the amount of the dilution that the violative transaction caused, it is blind to the amount of money set aside for Acuitas to help

remedy that harm, and it is blind to the potentially fatal harm that a standstill on equity-based fund raising could do to Ideanomics and its owners. The Court, in fashioning a temporary remedy, above all, seeks not to do harm. I am unpersuaded that a 48-day extension of the lockup would not, on balance, do harm.

Accordingly, the Court denies the request to extend the lockup period. Acuitas has shown irreparable harm and it has shown a likelihood of success on the merits. It may well be entitled to a greater remedy than the one as yet imposed, which involves a limited escrow of funds, but the balance of equities disfavors extending the lockup by 48 days.

Let me conclude with this. The Court remains solicitous of Acuitas' interests under the SPA. The Court is opening to considering other relief, such as setting aside additional funds for Acuitas, on a showing that such would assure of it of a remedy for the existing breach that may not be otherwise available if Ideanomics goes under. The denial today is, thus, without prejudice to Acuitas' right to pursue alternative equitable relief. I will not set a firm deadline for any such application or require that there be one. But upon such an application by Acuitas for additional relief, I would again expect to act quickly, and Ideanomics should expect to file a response within, at the most, three business days.

Therein ends the ruling.

What I am going to do is hand out for counsel the proposed amended order, I think I have captured every addition that I have made, and give you a couple of minutes just to review it to make sure there isn't some draftsman's error, but I'm not inviting reconsideration.

MR. BORDETSKY: Your Honor, may I address a separate point.

I sent in a letter after the first -- after the 31st with respect to the answer, moving it to May 5. It was on consent. We just didn't get a response from the Court. I know the Court is weighed down with other matters. I think it was ECF number 48. I just want to raise it to the Court.

THE COURT: You've agreed on consent that the answer should be adjourned until May 5?

MR. BORDETSKY: Thank you.

THE COURT: That's what you have agreed?

MR. BORDETSKY: Yes. To answer or otherwise respond.

THE COURT: I will grant that today.

MR. BORDETSKY: Thank you.

THE COURT: In any event, you can bank on the granting even if it doesn't hit ECF today. It's a partial holiday and ECF is shutting down early.

Granted.

MR. KRATENSTEIN: Thank you.

THE COURT: Take a look right now just at the order in

case there is some technical glitch.

Mr. Kratenstein, any glitch?

MR. KRATENSTEIN: Not a glitch, although one small request, given your admonition at the beginning of the hearing, on the escrow.

We would just ask, and I hope opposing counsel won't object to this, that they provide some evidence that the funds have been escrowed.

THE COURT: I am not going to put that in the court order, but just as a matter of professional courtesy, would you do that, please?

MR. BORDETSKY: Yes. I wanted to wait. Can we have that as an attorneys' eyes only?

THE COURT: Why?

MR. BORDETSKY: If there are financial aspects --

THE COURT: Here is the short answer: Yes. Without prejudice to Mr. Kratenstein's right to, upon reviewing it, say to the Court: On review there is nothing here that would be problematic.

In other words, in the first instance, yes, just to make this easy, so that he gets the confirmation. But I have every reason to expect, Mr. Bordetsky, your client can find a way to get that confirmation that doesn't implicate other interests, such as account numbers or market-moving information.

But in the first instance, yes, just to get it done.

MR. BORDETSKY: Thank you.

Conversely, I would ask that the Court, with respect to plaintiff's obligation to hold the proceeds *pendente lite* from the sale of the stock also be --

THE COURT: Attorneys' eyes only.

MR. BORDETSKY: Attorneys' eyes only.

THE COURT: Sure. What's good for the goose is good for the gander.

With that, other than that, the order is fine, right?

MR. KRATENSTEIN: Yes, your Honor.

THE COURT: Mr. Bordetsky.

MR. BORDETSKY: Yes, your Honor.

THE COURT: I am going to sign the order. I take it you'll need, as last week, a copy of the signed order for your clients?

MR. KRATENSTEIN: If your Honor would not mind posting it to ECF, yes.

THE COURT: We certainly will. The only issue is because it's -- I think the docketing staff may or may not be leaving early. I am not sure. Why don't I have my law clerk bring a copy to you downstairs.

MR. KRATENSTEIN: Thank you.

MR. BORDETSKY: Your Honor, if it could be emailed, as it was before --

THE COURT: That's fine. Even better.

MR. BORDETSKY: It can be emailed so we can send it to our respective clients?

THE COURT: Even better.

Let me just say this. This is a challenging problem. I think you can all tell. Like you, I'm trying to work my way through it.

There is also an issue lurking out here, which is, if Ideanomics were to go bankrupt, I wouldn't want the money that I have had set aside, whether the 313 or something larger, suddenly being lost -- its benefit lost to Acuitas. That occurred to me during the hearing today. I'm not a bankruptcy scholar, but I would encourage you to think about whether there is some manner in which that money could be held, including having Acuitas holding it in escrow, or something like that. To the extent there is some solution here that may have some beneficial consequence, I'd love for all of you to think about that. That emerges as an issue.

Again, what I'm really trying to do is, recognizing the risk of irreparable harm if Ideanomics goes under, trying to create a pool that at least provides some damage protection. I welcome your thinking about it.

More generally, I would like you to all work together on this. I am trying not to interfere with the efforts to survive and thrive that Ideanomics had. That's ultimately

better for everybody.

But at the same time it appears to me at first blush that the amount of money that's put in escrow, although the damage modeling is very complicated here, I can tell, it appears at first blush unlikely to capture the plausibly alleged harm that Acuitas would likely be able to contend it has suffered if events play out badly. I would like to find a way, as a matter of constructive problem solving, to have more and more up to some point of reason that is consistent with some defensible damages model, put aside in a way that's available just to protect their interests.

In the first instance, it would be great if counsel could speak about that. I could continue to referee these disputes, and I'm here for that and I'm happy to do it and it's a pleasure to have great lawyers and a challenging problem, but your clients are spending money on you to do that. If you are able to come up with some workaround, that would be best.

With that, can I see counsel at sidebar off the record.

(At sidebar; discussion off the record)

(Adjourned)